

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

**STRIKE 3 HOLDINGS, LLC, a  
Delaware corporation,**

Plaintiff,

V.

JOHN DOE, subscriber assigned IP  
address 73.225.38.130,

Defendant.

No. 2:17-cv-01731-TSZ

**PLAINTIFF/COUNTER-  
DEFENDANT'S REPLY TO  
DEFENDANT'S OMNIBUS  
RESPONSE TO REMAINING  
MOTIONS TO COMPEL**

Noted on Motion Calendar:  
**August 2, 2019**

## I. INTRODUCTION

Defendant’s Omnibus Response to Plaintiff’s Remaining Motions to Compel (“Defendant’s Response” or “Response”) boils down to two arguments. First, without any support, Defendant blames Plaintiff for his own failure to comply with his discovery obligations. Second, Defendant denies any connection to his Son’s hard drive, any obligation to preserve it, and any obligation to produce it, all while asserting that both he and his Son have a ‘joint defense’ entitling him to protection of their communications under the common interest privilege. Failing to meet any burden which would excuse his discovery violations, or which would support application of the common interest privilege, Defendant instead opts to obfuscate the issues by arguing against the imposition of

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1       sanctions. Interestingly, Defendant spends the majority of his Response explaining that he  
 2 has complied with his preservation duties and that he was not required to preserve his Son's  
 3 Hard Drive, yet Plaintiff's motions to compel seek the production of documents, not the  
 4 imposition of sanctions.

5       Noticeably, Defendant's Response fails to present any argument that the documents  
 6 sought in the motions to compel fall outside the broad scope of discovery, nor does  
 7 Defendant address any of the factors listed in Fed. R. Civ. P. 26(b). Defendant also fails to  
 8 provide any document (either privilege logs, written agreements, or affidavits) which  
 9 supports application of the common interest privilege. For the foregoing reasons, as  
 10 explained more fully below, Plaintiff respectfully requests that its Motion to Compel the  
 11 Son's Hard Drive be granted in its entirety, and that its Motion to Compel Production of  
 12 Documents, with respect to Request for Production No. 41, be granted.

## 13       II.      ARGUMENTS

### 14       A.      The Son's Hard Drive is in Defendant's Possession and Defendant has a 15                  Duty to Supplement His Discovery Responses

16       Defendant's Response contains a header titled "Strike 3 cannot compel John Doe to  
 17 produce information he [does not] have." Defendant's Response, however, completely  
 18 ignores his Son's testimony, the Federal Rules and case law. It is well-settled that "[a]  
 19 party responding to a document request cannot furnish only that information within his  
 20 immediate knowledge or possession; he is under an affirmative duty to seek that  
 21 information reasonably available to him from his employees, agents, or others subject to his  
 22 control." *Rogers v. Giurbino*, 288 F.R.D. 469, 485 (S.D. Cal. 2012) (internal quotations  
 23 omitted); *see also A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 189 (C.D. Cal.  
 24 2006); *Putz v. Golden*, No. C10-0741JLR, 2012 WL 13019220, at \*4 (W.D. Wash. May 22,  
 25 2012). Additionally, a party who has responded to a request for production is required to  
 26 "supplement or correct its [...] response: in a timely manner if the party learns that in some

1 material respect the disclosure or response is incomplete or incorrect, and if the additional  
 2 or corrective information has not otherwise been made known to the other parties during the  
 3 discovery process or in writing[.]” Fed. R. Civ. P. 26(e). Defendant “must [also] do more  
 4 than merely assert that the search was conducted with due diligence; rather, [he] must  
 5 briefly describe the search to allow the Court to determine whether it was reasonable.”  
 6 *Rogers v. Giurbino*, 288 F.R.D. 469, 485 (S.D. Cal. 2012). Finally, “[i]f Defendant []  
 7 maintains that there is no relevant material in [his] control, [he] must state so under oath.”  
 8 *Id.*

9 Defendant has not supplemented any discovery. Defendant has not explained how  
 10 the Son’s Hard Drive is not in his possession. Defendant has not explained any method he  
 11 used to confirm that the device is not in his possession. Simply put, Defendant does not  
 12 address any steps he has taken to comply with his affirmative duty under the Federal Rules.  
 13 Instead, he argues that since Plaintiff failed to ask particular deposition questions,  
 14 Defendant has no obligation to search for, produce, or preserve the Son’s Hard Drive, and  
 15 therefore, Plaintiff’s motion to compel should be denied.

16 In this case, the Son testified that his Hard Drive still existed and was in  
 17 Defendant’s storage bin. Thus, as soon as he learned of his Son’s testimony, Defendant had  
 18 an **affirmative duty** to seek out the information responsive to Plaintiff’s prior request for  
 19 production and if found, he had a duty to supplement his previously produced index of Hard  
 20 Drives with the model and serial number of his Son’s Hard Drive. Plaintiff’s alleged failure  
 21 to ask the Son particular deposition questions about the hard drive’s physical description  
 22 does nothing to negate Defendant’s duty.

1           Accordingly, Plaintiff respectfully requests entry of an order compelling Defendant  
 2 to produce his Son's Hard Drive.<sup>1</sup>

3           B.       The Common Interest Privilege is not Applicable

4           Shockingly, while attempting to absolve himself of any discovery obligation  
 5 regarding, in connection to, or control over his Son's Hard Drive, Defendant then argues  
 6 that the common interest privilege applies to his communications with his Son. Thus,  
 7 Defendant is quick to isolate himself from his Son when addressing the knowledge of,  
 8 preservation, and production of material evidence located in their shared residence, but then  
 9 claims that the two parties have a joint defense and thus their communications are protected  
 10 by the common interest privilege. Still, Defendant fails to meet his burden necessary to  
 11 establish application of the common interest privilege. "The common interest exception  
 12 applies when (1) the communication is made by separate parties in the course of a matter of  
 13 common interest; (2) the communication is designed to further that effort; and (3) the  
 14 privilege has not been waived." *Regents of Univ. of California v. Affymetrix, Inc.*, 326  
 15 F.R.D. 275, 279 (S.D. Cal. 2018) (internal quotations omitted). "The burden of establishing  
 16 that the 'joint defense' or 'common interest' doctrine applies is on the party asserting the  
 17 privilege." *In re Juniper Networks, Inc. Sec. Litig.*, No. C 06-4327 JW (PVT), 2009 WL  
 18 4644534, at \*1 (N.D. Cal. Dec. 9, 2009). Defendant's Response fails to set forth any set of  
 19 facts which meet that burden. Indeed, he has still not provided a privilege log sufficient to  
 20 establish that both he and his Son agreed to coordinate a joint defense. Notwithstanding the  
 21 foregoing, Plaintiff agrees to Defendant's proposal that the Court conduct an *in camera*  
 22 review of the communications between Defendant and his Son's attorneys to determine if  
 23  
 24

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25           <sup>1</sup> To clarify, Plaintiff proposes that the Son's Hard Drive should be added to and subsequently examined under  
 26 the terms set out in Plaintiff's Proposed ESI Protocol which was attached as Exhibit "A" to Plaintiff's Motion  
 to Compel Production of Defendant's Hard Drives. See Dkt. No. 125-1, pp. 2-7.

1       the common interest privilege applies or if any exception to the common interest privilege  
2       applies.

3       **III. CONCLUSION**

4       Plaintiff respectfully requests that its Motion to Compel the Son's Hard Drive be  
5       granted in its entirety, and that it's Motion to Compel Production of Documents be resolved  
6       with the Court's *in camera* review of the communications between Defendant and his Son's  
7       attorneys to determine if the common interest privilege applies or if any exception to the  
8       common interest privilege applies.

9       DATED this 2<sup>nd</sup> day of August, 2019

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1                   **CERTIFICATE OF SERVICE**

2                   I, Annabel Barnes, hereby certify that on August 2, 2019, I electronically filed the  
3 foregoing document with the Clerk of the Court using the CM/ECF system which will send  
4 notification of filing to the following parties:

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11                  DATED this 2<sup>nd</sup> day of August 2019 at Seattle, Washington.

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15                  Annabel Barnes, Legal Assistant